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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
9

10 BRYAN DENNIE,

11 Plaintiff,

Case No. 2:11-CV-00828-KJD-CWH

12 v.

ORDER

13 BRIAN E. WILLIAMS, *et al.*,

14 Defendants.

15
16 Presently before the Court is Defendants' Motion to Dismiss (#10). Plaintiff filed a response
17 in opposition (#12) to which Defendants replied (#13).

18 **I. Background**

19 Plaintiff, an inmate at Southern Desert Correctional Center ("SDCC"), alleges that he was
20 denied proper and adequate air circulation and ventilation inside the prison cell where he is housed
21 from July 5, 2010 through November 2010. The temperature during that period of time exceeded
22 one hundred degrees (100°) or higher more than fourteen (14) continuous days. On February 28,
23 2011, Plaintiff filed the present complaint for violation of his Eighth Amendment right to be free
24 from cruel and unusual punishment based on the conditions of his confinement. Defendants have
25 now moved to dismiss Plaintiff's claims asserting that he failed to exhaust his administrative
26 remedies.

1 II. Exhaustion of Administrative Remedies

2 The Prison Litigation Reform Act of 1994 requires that a prisoner exhaust any and all
 3 administrative remedies before filing a case in federal court. See Woodford v. Ngo, 548 U.S. 81, 85
 4 (2006). “Proper exhaustion demands compliance with an agency’s procedural rules because no
 5 adjudicative system can function effectively without imposing some orderly structure on the course
 6 of its proceedings.” Id. at 90-91.

7 A motion to dismiss for failure to exhaust nonjudicial remedies is treated as an unenumerated
 8 12(b) motion. See Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). In deciding a motion to
 9 dismiss for a failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and
 10 decide disputed issues of fact. See id. at 1119-20, citing Ritza v. Int’l Longshoremen’s &
 11 Warehousemen’s Union, 837 F.2d 365, 369 (9th Cir. 1988). If the district court concludes that the
 12 prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without
 13 prejudice. See id. at 368 n.3 (1988).

14 The State of Nevada has given the NDOC the power to enact regulations to establish a
 15 grievance procedure for inmates. See Nev. Rev. Stat. § 209.243. A prisoner must initiate the
 16 grievance procedure by filing an administrative claim “within [six] months after the date of the
 17 alleged loss, damage or injury.” Id. In accordance with section 209.243, the NDOC has adopted
 18 Administrative Regulation 740 (“AR 740”), establishing a grievance process for resolution of inmate
 19 problems and concerns.

20 An inmate must complete three levels of review, two formal and one informal, in order to
 21 exhaust his administrative remedies. See AR 740.02, 1.1.1. An inmate must first file an “Informal
 22 Grievance”. AR 740.02, 1.1.1.1. An inmate who is dissatisfied with the response may appeal the
 23 grievance to the next level. AR 740.02, 1.1.1.4. An inmate has five (5) days after the receipt of the
 24 response to his grievance to appeal to the next level of review. AR 740.02, 1.3.4. Once an inmate
 25 receives a response to his second level grievance, he is considered to have exhausted available
 26 administrative remedies.

1 III. Analysis

2 A. Exhaustion of Administrative Remedies

3 Plaintiff failed to timely grieve the lack of air conditioning during the summer of 2010.
4 Though he timely filed grievances at the informal and first level, he failed to file an appropriate
5 second level grievance and failed to timely correct his error. Specifically, Plaintiff's first submission
6 of the second level grievance, No. 2006-29-01976 was "Not Accepted" and returned to Plaintiff with
7 the following explanation: "You have not included the response from the first level grievance."

8 An inmate must file an appeal within five (5) days of receipt of the response to proceed to the
9 next grievance level. An inmates' failure to re-submit a grievance in the proper form and within the
10 prescribed time frame constitutes abandonment of the grievance. See AR 740.03, 740.06, 740.09.
11 Plaintiff admits that he received the Memorandum dated August 20, 2010, Re: "Improper Grievance
12 20062901976 2nd" (i.e. form DOC-3098), on September 3, 2010, but did not resubmit his second
13 level grievance until September 16, 2010 which was thirteen (13) days after he had received Form
14 DOC-3098. Plaintiff was not prevented from appealing to the next level as he contends, but chose to
15 file his appeal late.

16 Plaintiff makes no attempt to dispute Defendants' assertion that Plaintiff also failed to timely
17 file a proper second level grievance for appeal No. 2006-29-03878. Further, Plaintiff's refusal to
18 sign and date the returned second level grievance of this appeal constituted abandonment and is clear
19 evidence of his intention to abandon that grievance. Therefore, since Plaintiff failed to properly
20 exhaust his administrative remedies with respect to the Eighth Amendment conditions of
21 confinement claims pled against Defendants Williams, Burson and Cox in the complaint, the
22 complaint is dismissed.

23 B. Qualified Immunity

24 Even if the remedies had been exhausted, the Court would still dismiss Plaintiff's complaint,
25 because Defendants are entitled to qualified immunity. The defense of qualified immunity is
26 available if the official's conduct is objectively reasonable "as measured by reference to clearly

1 established law.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). A defendant is entitled to
 2 summary judgment based on the defense of qualified immunity only if, viewing the facts in the light
 3 most favorable to Plaintiff, the facts as alleged do not support a claim that the defendant violated
 4 clearly established law. Mitchell v. Forsyth, 472 U.S. 511, 528 (1985). This is a purely legal
 5 question. Id.; see also, Wood v. Ostrander, 879 F.2d 583, 591 (9th Cir. 1989). Qualified immunity
 6 provides “an entitlement not to stand trial or face the other burdens of litigation, conditioned on the
 7 resolution of the essentially legal question.” Mitchell, 472 U.S. at 526.

8 Resolving the issue of qualified immunity involves a two-step inquiry. Clement v. Gomez,
 9 298 F.3d 898, 903 (9th Cir. 2002) First, the Court must determine whether “[t]aken in the light most
 10 favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a
 11 constitutional right.” Saucier v. Katz, 533 U.S. 194, 201 (2001). A negative answer ends the
 12 analysis, with qualified immunity protecting Defendants from liability. Id. “If a constitutional
 13 violation occurred, a Court must further inquire whether the right was clearly established.” Clement,
 14 298 F.3d at 903 (quoting Saucier, 533 U.S. at 201) (internal quotations removed). If the law did not
 15 put the officials on notice that their conduct would be clearly unlawful, summary judgment based on
 16 qualified immunity is appropriate. Saucier, 533 U.S. at 202.

17 Here, there is no clearly established law showing that prison officials who address issues with
 18 the conditions of confinement and order work that is performed by contracted, outside workers to
 19 make repairs to the prison air conditioning system would be violating the constitutional rights of the
 20 prisoners. Therefore, Defendants are entitled to qualified immunity.

21 IV. Conclusion

22 Accordingly, IT IS HEREBY ORDERED that Defendants’ Motion to Dismiss (#10) is
 23 **GRANTED**;

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1 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Defendants
2 and against Plaintiff.

3 DATED this 22nd day of March 2012.

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7 Kent J. Dawson
8 United States District Judge
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